The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Neal R. Gross and Co., Inc.

File: B-233144

Date: February 15, 1989

DIGEST

1. A protest that the agency improperly failed to make multiple awards under a federal supply schedule procurement is denied where the record shows that nothing in the solicitation required that multiple awards be made, and that the agency's determination of the number of awards to make (or whether to make a single award) for a particular geographical area was reasonably based on its assessment of the offerors' capacity to meet anticipated requirements.

2. Allegations, raised for the first time after awards have been made, that a solicitation improperly was not conducted as a multiple award schedule (MAS) solicitation, are untimely, where it should have been clear from an amendment to the solicitation issued prior to the submission of initial proposals that the solicitation was not intended to be a MAS procurement.

DECISION

Neal R. Gross and Co., Inc., protests the failure of the General Services Administration (GSA) to make more than one award in all of the individual geographical areas covered by request for proposals (RFP) No. FCGA-SS-SS205N, issued by GSA as a federal supply schedule (FSS) procurement for verbatim reporting and transcript services. Although Gross received a single award for one geographical area (Puerto Rico), the firm asserts that the solicitation either was or should have been a multiple award schedule (MAS) procurement, and that Gross would have received additional awards in other areas if GSA had conducted the procurement properly, in accord with the standards applicable to MAS procurements.

We deny the protest.

The RFP was issued as an FSS procurement on October 30, 1987, and was amended twice. The RFP, as amended, solicited offers for various methods of reporting services, including electronic device, shorthand, steno-mask, and steno-type. The government reserved the right to award less than the total number of recording methods solicited so long as at least two methods were covered in each geographical area for which an offer was submitted. The RFP stated that technical ability was a more important evaluation factor than price, but that as proposals became more nearly equal in technical merit, evaluated price would assume increased significance. In addition, the RFP included a clause entitled "Evaluation of Offers for Multiple Awards," which provided that, "in addition to other factors, offers will be evaluated on the basis of advantages and disadvantages to the Government that might result from making more than one award. . . ."

As originally issued, the solicitation contained certain provisions appropriate to a particular type of FSS procurement, namely, a MAS procurement. An award under a MAS procurement results in the placement of the awardee on the appropriate schedule contract. Customer agencies then select among the several awardees for the product or service that meets their requirements and order directly from the schedule contractor. Agencies generally are responsible for selecting the lowest price item unless they can justify the purchase of a more expensive one. The purpose of a MAS procurement is to decrease agency open market purchases by offering commercial products at prices lower than otherwise available and to make commercial items available where it is impractical to draft adequate specifications for formally advertised or negotiated procurements, or where selectivity is necessary for agencies ordering from the supply schedule to meet their varying needs. See Federal Acquisition Regulation (FAR) § 38.102-2; see also General Services Administration--Multiple Award Schedule Multiyear Contracting, B-199079, Dec. 23, 1983, 84-1 CPD ¶ 46; General Services Administration Multiple Award Schedule Policy Statements, 50 Fed. Reg. 50502 (1985) and 47 Fed. Reg. 50242 (Nov. 5, 1982).

After issuance of the RFP, however, GSA determined that a MAS format was not appropriate because specifications describing the government's minimum needs already existed and there was no particular need for selectivity that could not be met without the use of a MAS procurement. Consequently, on December 21, a month before initial proposals were due, the agency issued amendment 1 to the RFP, which explicitly deleted the standard clauses that are required for MAS procurements, including a clause requiring that commercial pricing data be submitted with proposals.

Gross acknowledged amendment 1 and timely submitted its initial proposal by the January 22 closing date. The proposals were evaluated and scored and, after submission of best and final offers, the agency selected Gross as the single contractor for the Puerto Rico area schedule. GSA also made single awards in most of the other geographical areas, all of them to Heritage Reporting Company. In the remaining areas, the agency made varying numbers of awards (the largest number of awards for any one area was five, for the Washington, D.C., metropolitan area).

Gross first argues that, because the RFP was structured as a MAS procurement, offerors had a reasonable expectation that multiple awards would be made, and structured their proposals accordingly, particularly with respect to price. Consequently, according to Gross, the agency was required to make multiple awards.

This argument is unsupported by the record. First, there was nothing in the RFP as issued that stated that multiple awards necessarily would be made; although the solicitation, as noted above, originally included standard MAS clauses, it also included a clause entitled "Multiple Awards," which stated only that the government "may" make multiple awards. More importantly, there was nothing in the RFP as amended that required multiple awards or stated that multiple awards would be made. Indeed, we think the agency's issuance of amendment 1 made it abundantly clear that GSA did not intend necessarily to make multiple awards, since it explicitly deleted the standard MAS clauses, including the requirement for commercial pricing information that is central to price evaluation for this type of procurement. Thus, this aspect of the protest is without merit; there was no reasonable basis for offerors to assume that multiple awards would be made for all areas.1/

Gross alternatively argues that the procurement should have been, and improperly was not, conducted as a MAS procurement. This argument was not timely raised. Our Bid Protest Regulations provide that a protest based on alleged

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1/ In this regard, we note that Gross' own proposal, lacking as they did the commercial pricing information which Gross itself acknowledges is required for a MAS evaluation, suggest that the firm had a clear understanding of the nature of this procurement and of the way in which price would be evaluated.

improprieties in an RFP that are apparent before the closing date for receipt of initial proposals (the situation here) must be filed by that date. 4 C.F.R. § 21.2(a)(1) (1988). Any alleged impropriety concerning whether the solicitation should have been structured as a MAS procurement, as we have explained above, should have been apparent to Gross, at the latest, at the time amendment 1 was issued, deleting the MAS clauses and commercial pricing schedules from the RFP. Since Gross did not object to the amended RFP until almost a full year after the closing date, this portion of Gross' protest is untimely and will not be considered. See Credit Bureau, Inc., of Georgia, B-220890, Feb. 27, 1986, 86-1 CPD ¶ 202.

Gross finally asserts that it was the only technically qualified offeror, other than the awardee, in 39 geographical areas, and should have been on the schedule in at least some of these areas. Under the RFP clause, "Evaluation of Offers for Multiple Awards," GSA had the option of making more than one award based on its determination of the advantages and disadvantages to the government of doing so in any given area. Gross argues that the agency failed to take into account the capacity of awardees (other than itself) to meet the demand for reporting services in each area, that is, to meet the government's minimum needs, and that its failure to do so resulted in the improper exclusion of Gross in many of those areas, including Washington, D.C. In addition, Gross argues that it should have been added to the five firms that received awards for the Washington, D.C., metropolitan area, and that its exclusion from that schedule was arbitrary and capricious and unrelated to any determination by the agency as to whether five awardees would be enough to handle the demand for reporting services. Based on our review of the record, we disagree.

The determinative factors in GSA's decision as to how many awards should be made were the anticipated demand in each area and the specific capabilities of the various technically acceptable offerors to meet that demand. The record shows that GSA considered these factors in making its decision for each area in the evaluation. In this regard, GSA specifically considered in the evaluation offerors' general business experience, experience with other government contracts, the number and qualifications of personnel, proposed delivery systems, the nature and quality of equipment (including computer capability), the nature of quality assurance programs, and financial soundness. All of these factors, we believe, are reasonably related to the likelihood that a firm will be capable of satisfying the government's needs for the entire contract period. Further,

the record shows that where an offeror, though technically acceptable, was perceived as particularly strong in one method of reporting but weaker in another, GSA specifically considered the addition of another firm whose capabilities complemented those of the first. We conclude that GSA's determinations of the number of awards to make for each area were based on rational considerations, and thus are unobjectionable. Gross has provided no evidence to the contrary.

As for Gross' allegedly improper exclusion from the Washington, D.C., metropolitan area schedule, the record shows that awards were made to the five low-priced offerors. Although Gross, the sixth low offeror, received a technical score comparable to that of the awardee with the lowest technical score, Gross' price was substantially higher.2/ Under these circumstances, where Gross was ranked essentially technically equal to one of the awardees, award to that other firm on the basis of price was consistent with the stated evaluation criteria. See Sparta, Inc., B-228216, Jan. 15, 1988, 88-1 CPD ¶ 37 (offerors with varying technical scores may be considered essentially equal and, among them, award made on the basis of price). Consequently, based on our review of the record, we find no basis for Gross' objections to the number of awards made in each area.

The protest is denied.

Seymour Efros

James F. Hinchman
General Counsel

2/ Gross and all awardees were found technically "highly acceptable;" although Gross' numerical technical score was at the low end of the range of scores within the "highly acceptable" group, offerors within the group were considered technically equal.